NO. 46782-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AHSSON SPRY and KARI SPRY, a married couple, individually and on behalf of K.A.S., M.A.S. and G.J.S., minors,

Appellants,

v.

PENINSULA SCHOOL DISTRICT; "JOHN AND JANE DOES" 1-25, BELLEVUE POLICE DEPARTMENT, JAY JOHNSON, BRENDA JOHNSON, JOHN KIVLIN, MICHELLE KIVLIN and DOES 1-25,

Respondents.

BRIEF OF RESPONDENT PENINSULA SCHOOL DISTRICT

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I. INTRODUCTION

Nothing in the Sprys' Opening Brief, or in the record before the Court, supports reversal of the Pierce County Superior Court's ("Trial Court" herein) September 15, 2014 order granting the Peninsula School District's ("PSD") Motion for Summary Judgment.

The Sprys' arguments for reversal are fundamentally flawed in several ways. The Sprys fail to discuss or even recite the elements of their claim under the Washington Law Against Discrimination ("WLAD"). They fail to discuss either the longstanding burden-shifting scheme applied in WLAD cases or how they could satisfy their burden of proof. The Sprys repeatedly claim that the Trial Court ignored "key pieces of evidence," but nowhere do they identify such evidence. They frequently cite federal case law, mostly from the Third Circuit Court of Appeals, and incorrectly claim that such case law represents controlling authority by the Washington Court of Appeals. More importantly, they neglect to explain how the foreign case law applies to the facts of their case. The Sprys offer no argument or authority regarding dismissal of their negligence-based claims. They raise a new claim of retaliation for the first time on appeal. Finally, just as they failed to do before the Trial Court, the Sprys fail to identify any evidence in the record before this Court creating a genuine issue as to any material fact. Therefore, the Court can and should affirm the Trial Court's order granting PSD's Motion for Summary Judgment.

Likewise, the Court should affirm the Trial Court's denial of the Sprys' motion for both an extension of the discovery cutoff and a trial date continuance. The Trial Court did not abuse its discretion in finding that the Sprys failed to show good cause for their requests.

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Sprys fail to establish a prima facie case of race discrimination under the WLAD.

2. Whether, pursuant to RAP 9.12 and RAP 2.5, the Court should refuse to review the Sprys' claim of retaliation under RCW 49.60.210 where they raise the claim for the first time on appeal.

3. Whether summary judgment dismissal of the Sprys' common law negligence and negligent infliction of emotional distress claims should be affirmed where the claims are based upon the same factual allegations as their WLAD discrimination claims.

4. Where the Sprys failed to show good cause, whether the Trial Court abused its discretion by denying the Sprys' motion to extend the discovery cutoff and continue the trial date.

III. RESPONDENT'S STATEMENT OF THE CASE

A. The Sprys' Complaint

Plaintiffs Ahsson and Kari Spry are the parents of minors K.A.S., M.A.S. and G.J.S. One or more of the Spry children have been enrolled at PSD since the 2006-2007 school year. On September 27, 2013, the Sprys filed the instant action against PSD alleging: 1) racial and national origin

discrimination; 2) negligence; and 3) negligent infliction of emotional distress. Clerk's Papers ("CP") at 12-13, (Complaint, ¶¶ 5.1 through 5.3). In their Complaint, the Sprys set forth the following incidents of alleged discrimination involving PSD:

- "K.A.S. was subject to disparate disciplinary reporting from recess duty Soden" during the 2006-2007 and 2007-2008 school years at Artondale Elementary. CP at 6 (Compt. at ¶ 4.3).
- "K.A.S. and M.A.S. were subject to disparate disciplinary reporting from Teacher Mahaffie (re K.A.S.) and Teacher Jangaard (re M.A.S.)" during the 2008-2009 school year at Artondale Elementary. *Id.* at ¶ 4.4.
- Reports were made by PSD personnel to DSHS regarding Ahsson and Kari Spry in 2009 and 2011. CP at 7-8 (*Id.* at ¶ 4.7).
- K.A.S. was not moved to a different classroom at Artondale Elementary after the Sprys reported tensions between their family and the family of another child in the class. CP at 8-9 (*Id.* at ¶ 4.8).
- No action was taken after the Sprys reported alleged bullying of K.A.S. by other students. *Id.*
- The Spry children were transferred to Harbor Heights Elementary School prior to the 2009-2010 school year where "recess duty Penson made multiple discriminatory discipline reportings about M.A.S.," "teacher McClelland yelled at and verbally demeaned M.A.S....before school began," M.A.S. "sat in the office and

waited daily to be moved to a different class....[for] eight school days before PSD agreed to the transfer," and "M.A.S. became the subject of constant surveillance by the recess duties and Harbor Heights staff[.]" CP at 10-11 (*Id.* at ¶ 4.10).

B. The Sprys Neither Explained Nor Substantiated Their Allegations

The Sprys persistently refused to provide more specific information regarding their allegations during the discovery phase of the case. PSD served written discovery upon the Sprys on January 24, 2014. CP at 68, 82. Included were interrogatories requesting that the Sprys identify and describe all facts relating to their causes of action. *Id.* The Sprys provided no substantive responses, but instead stated that they were "unable to answer this without legal assistance; will seek legal assistance to properly answer this interrogatory." CP at 84-87. The Sprys never supplemented their responses.

Plaintiff Ahsson Spry failed to appear for his deposition on April 28, 2014. On May 19, 2014, the Trial Court entered an order compelling Mr. Spry to appear for his deposition and imposing $784 in terms. CP at 262. Mr. Spry later appeared for his deposition. During their depositions, Ahsson and Kari Spry were asked to describe every incident that formed the basis of their discrimination claim against PSD. CP at 91, 98 (Kari Spry Deposition at 26:12-14; Ahsson Spry Deposition, Vol. 1, at 20:16-20). As to each incident, the Sprys did not know whether they or their children had been treated differently than any other person would have

been under similar circumstances. CP at 30-31, 94 (K. Spry Dep. at 74:17-75:21), 95 (*Id.* at 77:14-18), 103 (A. Spry Dep. at 33:6-111), and 104 (*Id.* at 52:2-6).

The Trial Court specifically asked the Sprys to address that point during the September 15, 2014 summary judgment hearing:

> THE COURT: Let me ask you a question. One of the points, as counsel pointed out – and I'm going to use the words that I have down here – is that Defendant discriminated against Plaintiff by not treating them in a manner comparable to the treatment it provided to persons outside that class.
>
> In the materials you provided in response to the Motion for Summary Judgment, can you point to me any information concerning that element?

Verbatim Report of Proceedings ("RP") at 13. Appearing *pro se*, Kari Spry answered that PSD's reports to Child Protective Services about their children appeared, to her, to be based upon racial animus. RP at 13-14. She also referenced an email by John Kivlin, a parent whose children attended school with the Sprys' children and who had a personal dispute with plaintiff Ahsson Spry. RP at 11. On May 4, 2009, Kivlin sent the email to PSD principal Kathryn Weymiller. CP at 130. The email contained several derogatory comments regarding the Sprys' character, though nothing regarding the Sprys' race, nationality, or religion. *Id.* Kari Spry read the entire email into the record at the September 15, 2014 hearing. RP at pp. 11-12. PSD addressed the Sprys' contentions during argument by its counsel at the hearing:

> MR. HARRIS: [...] even if you accept Ms. Spry's interpretation that the e-mail was somehow based upon racial animus, you can't impute that to a principal who the e-mail is addressed to. Now, if the principal had sent an e-mail back and said, Oh, you're right, it's because of their race, we need to get these folks out of the community, that would be a different ball of wax, and I would concede that. You don't have that. You have a one-sided communication to a principal. It doesn't mention anything about race.
>
> RP at 16;
>
> [...]
>
> No. 2, Ms. Spry did – just so the record is clear, Ms. Spry did allude to CPS reports that were asserted by members of the school staff. That's true, school – CPS reports were asserted, but under – school personnel are regarded as mandatory reporters. If there's any type of information that could lead a person to believe that there's abuse going on, they don't have an option. It's a misdemeanor, as a matter of fact, if they don't report it. So they could be subjected to criminal liability for not reporting it.
>
> RP at 17.

Moreover, Kari Spry admitted that the basis for the CPS report was true – that her son appeared at school with an open wound on his head. CP at 92 (K. Spry Dep. at 31:13-32:1) and RP at 17-18. On a second occasion, school personnel made a report to CPS because one of the Sprys' sons reported that his parents disciplined him by forcing him to remain seated on his knees for extended periods of time. CP at 92-93 (K. Spry Dep. at 32:5-33:9); RP at 18-19. The Sprys admitted that they disciplined their child in that manner and that their child had reported it to the school nurse. *Id.* Other reports by PSD to CPS reference "unexplained bruises" (CP at 134), "bruise on face" (CP at 142), "black eye" (CP at 152), and

statements by plaintiff M.A.S. that "Dad gave me the scar on my arm" (CP at 134) and "I went to bed at 1:00. I am tired. I was up partying with my Dad" (CP at 126). As PSD's counsel argued to the Trial Court at the September 15, 2014 hearing:

> MR. HARRIS: So it's not a situation where you don't have conduct that's occurring where school staff is put in a situation where they have to make a report; they can't do their own investigation and discern whether or not it's reportable or not. Under the statute, that's RCW 26.44. *et seq.*, if you're a mandatory reporter, you have to make the report and let CPS iron it out. That's all that was done.
>
> **More importantly, Your Honor, for purposes of this analysis, Ms. Spry has proffered no evidence whatsoever to suggest that there weren't other CPS reports made against folks who fell outside the protected class who were not African-American.** That's a burden of production that she has not shown because she can't show it. These folks were consistent in their reporting, and it had nothing whatsoever to do with the Sprys' race, religion or creed, as the case may be.

RP at 19-20 (emphasis added).

Ultimately, the Sprys failed to provide any evidence to support their discrimination claims beyond their own feelings, speculation and conjecture. *See, e.g.*, CP at 108 (Declaration of Kari Spry, ¶ 3: "If you ever complain about discrimination you are therefore ostracized and mistreated"); CP at 191-92 (Declaration of Ahsson Spry, ¶ 2: "[description of alleged incidents] all of which I found to be discriminatory information to be provided"; ¶ 8: "my wife advised me to stay out of the school as she was concerned of a bias that principal Godwin-Austen had against me"); CP at 187-88 (Declaration of K.A.S., ¶ 2: "I believe I was discriminated

against because of [my race]"; ¶ 3: "I felt I was being treated differently than other students"; ¶ 5: "I felt that the recess duties on the playground were racist"; and ¶ 11: "it made me feel bad"; CP at 199 (Declaration of M.A.S. ¶ 2: "I believe I was discriminated against because of [my race]").

The Trial Court granted PSD's motion for summary judgment concluding that (1) the Sprys' relied upon "conclusory statements without evidence of differential treatment" other than opinion and subjective feelings, and (2) they failed to satisfy their prima facie burden specifically regarding the third element of their discrimination claim under the WLAD. RP at 20-21 ("plaintiff has failed to provide evidence [...] of an objective nature that the defendants discriminated against the plaintiff[s] by not treating them in a manner comparable to the treatment provided to persons outside the class.").

C. The Sprys Offered No Argument or Authority Opposing Dismissal of Their Negligence Claims

In their Complaint, the Sprys asserted claims for common law negligence and negligent infliction of emotional distress. CP at 12-13. However, the Sprys offered no argument or authority opposing summary dismissal of their negligence claims, nor did they deny that those claims are duplicative of their discrimination claims. When asked about the negligence claims at the September 15, 2014 hearing, Kari Spry provided no authority contrary to PSD's position and instead argued only that she

and her family had endured emotional distress. RP at 22. The Trial Court granted PSD's motion and summarily dismissed the claims. RP at 22-23.

D. The Sprys Failed to Diligently Prosecute Their Lawsuit and the Trial Court Denied Their Motion to Extend the Discovery Cutoff and the Trial Date

After filing their Complaint on September 27, 2013, the Sprys did nothing to prosecute their case. The discovery cutoff expired on August 8, 2014. The trial date was October 6, 2014.[1] The Sprys failed to comply with every significant deadline on the case scheduling order. CP at 224, 254. As plaintiff Kari Spry informed the Trial Court at the September 15, 2014 summary judgment hearing, the Sprys undertook no discovery in the twelve months since they filed their complaint:

> THE COURT: The question I have concerning the discovery, what discovery have you done?
>
> MS. SPRY: I have done none. [...]

RP at 5. They served no written discovery on any defendants. They took no depositions. On August 1, 2014, seven days before the discovery cutoff, the Sprys requested that PSD agree to extend the discovery cutoff. CP at 256. Given that the Sprys had conducted no discovery, given that they never supplemented their non-responsive answers to PSD's

[1] Although not reflected in the record, the original trial date was September 25, 2014. The Trial Court assigned the case to a visiting judge because Mrs. Spry was an employee of the Trial Court, as noted by the Sprys on Page 11 of their Opening Brief. In order to accommodate the schedule of the visiting judge (The Honorable William Houser of the Kitsap County Superior Court), the Trial Court on July 30, 2014 administratively continued the trial date to October 6, 2014 and instructed the parties by email to file both motions at issue in this appeal for a hearing on September 15, 2014. The Trial Court did not extend the discovery cutoff.

interrogatories and forced PSD to bring a motion to compel Ahsson Spry's deposition, PSD responded that it was not agreeable to extending the discovery cutoff. *Id.* In their request for an extension of the deadline, the Sprys acknowledged they would need to file a motion requesting an extension well in advance of the deadline, "[w]e need to file something by Monday [August 4, 2014] towards this end" (CP at 256), yet they failed to file their motion requesting an extension of the discovery cutoff until August 7, one day before discovery closed. CP at 21.

In their Motion to Extend Discovery Cutoff,[2] the Sprys failed to identify any evidence they sought to obtain through discovery that would raise a genuine issue as to any material fact. CP at 21-22. At the September 15, 2014 hearing on the Sprys' extension motion, the Trial Court asked Kari Spry why plaintiffs needed a continuance of the trial date. RP at 5. Mrs. Spry answered that a continuance was needed so that discovery could occur, but she did not identify any evidence that the Sprys hoped to obtain by conducting eleventh-hour discovery. *Id.* at 6. The Trial Court concluded that the Sprys failed to demonstrate good cause for extending the discovery cutoff or continuing the trial date, and denied their motion. RP at 9-10.

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[2] Lengthily entitled "Motion to Extend Discovery Cutoff, Leave to Amend Complaint; Trial Date Continuance; and Payment Plan of Previously Ordered Costs Due to Defendant Peninsula School District."

IV. STANDARDS OF REVIEW

A. Order Granting PSD's Motion for Summary Judgment

The Trial Court's order granting PSD's motion for summary judgment is subject to *de novo* review. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). The Court of Appeals performs the same inquiry as the trial court and should affirm the order granting summary judgment when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*, quoting *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007).

The Court must review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Lakey*, 176 Wn.2d at 922. However, the nonmoving party "may not rest upon the mere allegations or denials of his pleading" to resist a motion for summary judgment. CR 56(e). If a plaintiff's response "fails to make a showing sufficient to establish the existence of an element essential to his case," then the defendant's motion for summary judgment should be granted. *Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A trial court ruling, including a grant of summary judgment, may be affirmed on any ground supported by the record, *Estep v. Hamilton*, 148 Wn. App. 246, 255-56, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027

(2009), even if the trial court did not consider it, *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

B. Order Denying Extension of Discovery Cutoff or Trial Date Continuance

The Trial Court's order denying the Sprys' motion to extend the discovery cutoff and continue the trial date is reviewed for manifest abuse of discretion. *Trummel v. Mitchell*, 156 Wn.2d 653, 670-71, 131 P.3d 305 (2006). In exercising its discretion,

> a court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court.

Id. at 670-71. Regarding a motion to continue the discovery cutoff, a court may also consider the purpose of a discovery cutoff, which is "to protect the parties from a continuing burden of producing evidence and to assure them adequate time to prepare immediately before trial." *Buhr v. Stewart Title of Spokane, LLC*, 176 Wn. App. 28, 36, 308 P.3d 712 (2013), quoting *Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir.1984). A court abuses its discretion "when its decision is based upon a ground, or to an extent, clearly untenable or manifestly unreasonable." *Buhr*, 176 Wn. App. at 36, citing *Trummel*, 156 Wn.2d at 671.

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V. ARGUMENT

A. The Court Should Affirm the Summary Judgment Dismissal of the Sprys' WLAD Claims

1. The Sprys' Claims Are Subject to a Burden Shifting Analysis

In cases alleging discrimination under the WLAD, RCW Chapter 49.60, Washington courts use the burden shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, the plaintiff has the initial burden of proving a prima facie case. *Domingo v. BECU*, 124 Wn. App. 71, 77, 98 P.3d 1222 (2004). However, the plaintiff must do more than express an opinion or make conclusory statements. *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). The plaintiff must establish "specific and material facts to support each element of his or her prima facie case." *Id.* If a plaintiff cannot establish specific and material facts to support each element of the prima facie case, the defendant is entitled judgment as a matter of law. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001) (superseded by statute, regarding definition of disability only, as stated in *Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 249 P.3d 1044 (2011)).

If the plaintiff is able to establish a prima facie case, an inference of discrimination arises. *Domingo*, 124 Wn. App. at 77. In order to rebut this inference, the defendant must present a legitimate nondiscriminatory explanation for its action. *Lewis v. Doll*, 53 Wn. App. 203, 206, 765 P.2d

1341 (1989). The plaintiff must then show that the proffered reason is merely pretext for unlawful discrimination. *Id.* If a plaintiff cannot present evidence that the defendant's reasons are untrue or mere pretext, summary judgment must be granted. *Domingo*, 124 Wn. App. at 78.

In their Opening Brief, the Sprys neglect to mention the well established burden shifting analysis. They argue that "the only issue is whether plaintiffs have produced evidence to support an inference of discrimination for purposes of summary judgment," which misstates their initial burden. The Sprys must produce specific and material facts to establish their prima facie case, from which an inference of discrimination arises. Op. Brief at 8. Ignoring the requirement to produce specific and material facts, the Sprys cite non-controlling authority to claim that their burden on summary judgment should be "relaxed" because plaintiffs in discrimination cases must often rely upon circumstantial evidence. *Id.* In limited circumstances, Washington courts have adopted relaxed federal standards as to specific elements of a plaintiff's prima facie case. *E.g., Fulton v. Dept. of Social and Health Services*, 169 Wn. App. 137, 156, 279 P.3d 500 (adopting relaxed federal standard that drops requirement for proof of job application in failure-to-promote discrimination cases). No authority holds, however, that a relaxed burden eliminates the Sprys' initial burden of producing specific and material facts to support each element of their prima facie case. To meet their initial burden, the Sprys must produce more evidence than none at all.

For the reasons explained in the following sections, the Sprys are unable to establish a prima facie case of discrimination against PSD. They have no evidence that PSD discriminated against them or their children, or that race was a substantial factor in any decision made by PSD regarding the Sprys. Moreover, even if the Sprys were able to muster a prima facie case, PSD's actions with regard to the Sprys and their children were taken for legitimate nondiscriminatory reasons, and the Sprys cannot demonstrate otherwise. The Court should affirm the dismissal of the Sprys' WLAD claims against PSD.

2. The Sprys Fail to Establish a Prima Facie Case of Race Discrimination

The WLAD, RCW 49.60.030, prohibits discrimination in places of public accommodation because of race, creed, color or national origin. To establish a prima facie case of race/national origin discrimination in a place of public accommodation the Sprys must show that 1) they are members of a protected class; 2) the defendant's establishment, here PSD's schools, is a place of public accommodation; **3) PSD discriminated against the Sprys by not treating them in a manner comparable to the treatment it provides to persons outside of the protected class;** and **4) the Sprys' protected status was a substantial factor causing the discrimination.** *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 525, 20 P.3d 447 (2001) (emphasis added because only the third and fourth elements are in dispute).

The first and second elements are not in dispute. Mr. Spry and the Spry children are African-American and PSD is a place of public accommodation. However, the Sprys have failed to demonstrate that PSD did not treat the Sprys or their children in a manner comparable to the treatment PSD provides to persons who are not members of a protected class. Even assuming, *arguendo*, that PSD treated the Sprys or their children differently than persons who are not members of a protected class, the Sprys cannot demonstrate that their status as African-Americans was a substantial factor in causing the alleged discrimination.

a. The Sprys Cannot Demonstrate That PSD Treated Them In a Manner Not Comparable to the Treatment It Provides To Persons Who Are Not African-American

The Sprys have never identified a single instance of a comparator receiving different treatment from the PSD. During their depositions, Kari and Ahsson Spry both admitted that they do not know whether any other students or parents were treated differently by PSD than they were treated. CP at 30-31, 94 (K. Spry Dep. at 74:17-75:21), 95 (*Id.* at 77:14-18), 103 (A. Spry Dep. at 33:6-111), and 104 (*Id.* at 52:2-6). No facts in the record remotely suggest, for example, that PSD personnel were more lenient in their discipline of Caucasian students in similar situations, or that the PSD declined to report suspected abuse to DSHS when Caucasian parents were involved. Throughout their pleadings and testimony, the Sprys have done nothing more than describe the treatment they allegedly received, without

demonstrating with competent evidence that the alleged treatment was not comparable to the treatment others received.

Moreover, in some of the alleged incidents, the Sprys do not even know whether the alleged perpetrator was a PSD employee. CP at 102, 106 (A. Spry Dep., Vol. 1, 32:11-17; A. Spry Dep., Vol. 2, 22:13-15).

Since the Sprys failed to proffer any evidence creating a genuine issue as to any material fact regarding the third element of their prima facie case, the Trial Court properly dismissed[3] their discrimination claim, and this Court should affirm the dismissal.

b. The Sprys Cannot Demonstrate That Their Protected Status Was a Substantial Factor In Causing the Alleged Discrimination

Even if the Sprys were able to show that other students or parents were treated differently, that alone is insufficient to meet their burden. *Disnute v. City of Puyallup*, 533 Fed. Appx. 734, 736 (2013) ("Merely pointing out that Appellants were treated differently than other fishers of a different race is not enough."); *Demelash*, 105 Wn. App. at 526 ("Demelash's evidence that 17 percent of Ross Stores' customer complaints over the last 5 years alleged race discrimination does not meet the required burden.").

The Sprys' entire basis for their contention that race was a substantial factor in causing the alleged discrimination is purely

[3] Without citing to any support in the Verbatim Report of Proceedings, the Sprys accuse the Trial Court of improperly requiring "smoking gun" evidence of discrimination (Op. Brief at 8) and of basing its summary judgment ruling upon credibility determinations (Id.

speculative. They claim they know PSD discriminated against them because of their race because they *believe* it happened. CP at 99-100 ("I believe to retaliate against us the school district transferred our kids", A. Spry Dep. 21:2-4; "I believe that my kids were transferred because of they're African American", *Id.* 25:4-5). Or, because of their prior experiences with racism. CP at 101 ("Q: What's your basis for saying that was due to your race; just kind of a feeling you had as an African-American man? A: Experience", Id. 28:5-8). Or, because they *felt* that a particular incident was discriminatory. CP at 95, 101 ("Q: What's your basis for saying that [being asked to fill out a background check form] was due to your race? This is just something you felt? A: Yes", *Id.* 28:1-3; "Q: So I am just trying to ascertain your basis for saying that that encounter with your family in that instance was because of their ethnic background. A: I don't know why. That's just what I felt", K. Spry Dep. 77:10-13).

One's feelings and speculative beliefs are insufficient to show that race was a substantial factor. *Evergreen Sch. Dist. v. Wash. State Human Rights Com.*, 39 Wn. App. 763, 772-73, 695 P.2d 999 (1985) ("It is not enough that some hasty, chance or inadvertent word or action may offend or even make on feel unwelcome...rather, the test is objective and requires a finding of a particularized kind of treatment, consciously motivated by or based upon the person's race or color."). The Sprys fail to provide any

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at 9). Nothing in the Report supports the Sprys' accusations.

objective evidence that their race was a substantial factor in causing any of the alleged actions of PSD. In their Opening Brief, the Sprys fail to identify any such evidence and instead rely upon general accusations of racism and upon one grossly overstated allusion to the June 17, 2015 church shooting in Charleston, South Carolina.[4] Although the Sprys insist that the Trial Court ignored "key pieces of evidence," nowhere do they identify such evidence. Op. Brief at 4, 10. Given this lack of evidence in support of the fourth element of their prima facie case, the Court should affirm the Trial Court's summary judgment dismissal of the Sprys' discrimination claim under the WLAD.

c. PSD Had Legitimate Nondiscriminatory Reasons For Its Actions

Assuming, *arguendo,* that the Sprys could somehow make out a prima facie case, the burden would shift to PSD to proffer legitimate, nondiscriminatory reasons for the alleged discriminatory acts. *See Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369, 371, 803 P.2d 841 (1991). This is merely a burden of production, not a burden of persuasion. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363-64, 753 P.2d 517 (1988).

Here, PSD transferred plaintiffs K.A.S. and M.A.S. to their neighborhood school because of their poor attendance, disciplined K.A.S.

[4] *E.g.*, Op. Brief at 3 (claiming, without support, that a "culture of racism" exists at PSD); at 4 (alleging a "racially pervasive atmosphere", "racist behavior", and that "PSD harbors racial animus toward African American students generally"); at 5 (alluding to the Charleston church shooting).

and M.A.S. because of their behavior, held M.A.S. out of class during the transfer process due to his parent's insistence of the same, and made mandatory reports to Child Protective Services because of objective signs of potential abuse. Even Kari Spry admitted that the objective reasons for the Child Protective Services reports were valid as they indeed occurred. CP at 92-93 (K. Spry Dep. at 31:15-33:5). The Sprys could have demonstrated that PSD's reasons were pretextual by showing that: 1) PSD's reasons had no basis in fact; 2) PSD's reasons were not really motivating factors; or 3) that PSD's reasons were insufficient to motivate their actions. *See Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012). The Sprys made no such showing, however. The only evidence the Sprys offered to demonstrate pretext were reports from PSD teachers describing their sons' positive attributes, and the fact that DSHS concluded that that there was insufficient evidence of abuse following one of the school's mandatory reporting incidents. CP at 114, 116, 118, 205-06. This evidence is woefully insufficient to demonstrate pretext.

The Trial Court did not reach this part of the burden shifting analysis because it concluded that the Sprys failed to establish their prima facie case. RP at 20-21. Nonetheless, since the Sprys are unable to produce evidence that the above legitimate, nondiscriminatory reasons are merely pretext, the Court should affirm the Trial Court's dismissal of the Sprys' discrimination claims.

B. The Sprys Raise Retaliation For the First Time on Appeal

For the first time on appeal, the Sprys reference a claim for retaliation in violation of RCW 49.60.210 of the WLAD.[5] The Sprys' Complaint does not mention retaliation, let alone assert a cause of action under RCW 49.60.210.[6] The Sprys did not provide to the Trial Court any facts, citations to authority, or oral argument in support of a retaliation claim. In dismissing the Sprys' discrimination claims under the WLAD, the Trial Court made no separate findings of fact or conclusions of law regarding retaliation. As such, not only does this Court possess no basis to determine whether the Trial Court erred in its dismissal of a retaliation claim, it has no basis to conduct a *de novo* review of such a claim.

"On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. The Court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). It is impossible for PSD, now, to guess at what the Sprys' facts, arguments, and authorities *would have been* had they raised a retaliation claim in their Complaint or at any time before the Trial Court. It is not clear, for example, whether the Sprys would have alleged that PSD

[5] RCW 49.60.210(a) states: "It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter."

[6] The Sprys' Opening Brief likewise contains no facts, argument, or authority in support of retaliation. Their only reference to retaliation appears in Assignment of Error No. 4,

retaliated *by taking adverse action specifically against the Spry parents* or, by contrast, that PSD retaliated against the parents *by taking adverse actions against the Spry children.* At least one court has rejected a parent's retaliation claim under federal Title IX based upon adverse actions taken by a school against a child. *See Jones v. Beverly Hills Unified Sch. Dist.*, 2010 WL 1222016 (C.D.Cal. 2010) ("Mary Jones's retaliation claim is based on retaliation directed at her daughter, not her, i.e., Chelsea did not make the girls' basketball team because Mary complained. Mary, therefore, cannot state a retaliation claim under Title IX and that claim...is dismissed with prejudice.").

Since the Sprys did not provide any facts, arguments, or authorities to the Trial Court in support of a retaliation claim (or to this Court for that matter), the Court can and should refuse to review their retaliation claim.

C. The Court Should Affirm Summary Judgment Dismissal of The Sprys' Negligence Claims

The Sprys provided no argument or authorities to the Trial Court regarding their common law negligence claims and they fail to do so again here in their Opening Brief. Therefore, there is no basis for the Court to reverse the Trial Court's summary dismissal of those claims.

As PSD argued below, a negligent infliction of emotional distress ("NIED") claim cannot be based upon the same facts as a contemporaneous discrimination claim. *Robel v. Roundup Corp.*, 103 Wn.

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which they conclude by citing virtually all of the Clerk's Papers. Op. Brief at 2-3.

App. 75, 91, 10 P.3d 1104 (2000), *rev'd on other grounds at* 148 Wn.2d 35, 59 P.3d 611 (2002) ("Washington Courts will not recognize a claim...for negligent infliction of emotional distress...when the only factual basis for emotional distress is the discrimination claim."); *Chea v. Men's Warehouse, Inc.*, 85 Wn. App. 405, 413, 932 P.2d 1261 (1997) ("A separate claim for emotional distress is not compensable when the only factual basis for emotional distress was the discrimination claim"); *Johnson v. Dep't. of Soc. & Health Servs.*, 80 Wn. App. 212, 230-31, 907 P.2d 1223 (1996) ("Moreover, emotional distress is compensable in a discrimination action, Johnson's only claim, so Johnson does not need to rely on negligent infliction of emotional distress"); *Haubry v. Snow*, 106 Wn. App. 666, 678, 31 P.3d 1186 (2001) ("Here, there is no separate compensable claim because the factual basis for the emotional distress claim is the same as the sexual harassment or discrimination claim. ... [An NIED] claim only arises when the claim is based on a separate factual basis from the sexual discrimination claim.").

Likewise, Courts have dismissed assorted common law negligence claims when those claims are duplicative of a plaintiff's discrimination claim. For example, the court in *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000) dismissed the plaintiff's claims for negligent supervision and retention finding that duplicative negligence claims cannot lie:

> "Here, ... the Francoms rely on the same facts to support both their discrimination claim and their negligent supervision or retention claim. Just as with their claim for negligent infliction of emotional distress, the claim is duplicative, and the superior court properly dismissed it."

Francom, 98 Wn. App. at 866. The Sprys' NIED and negligence claims are based upon the same factual allegations as their discrimination claims. The Trial Court properly dismissed the Sprys' negligence-based claims and this Court should affirm.

D. The Court Should Affirm the Trial Court's Denial of the Sprys' Motion to Extend Discovery Cutoff and Continue Trial Date

It was not a manifest abuse of discretion for the Trial Court to deny the Sprys' motion requesting an extension of the discovery cutoff and a continuance of the trial date. The Sprys wasted an entire year, between the filing of their lawsuit in September 2013 and the summary judgment hearing in September 2014, during which they utterly failed to prosecute their lawsuit. They undertook no discovery. They disclosed no witnesses. They refused to provide substantive discovery answers. They failed to meet every significant court-imposed deadline. Plaintiff Ahsson Spry failed to appear for his first scheduled deposition, requiring PSD to move for an order compelling him to appear on a later date. When the Sprys moved for an extension of the discovery cutoff, they waited until *the day before the cutoff* to file their motion. Their motion failed to identify (1) the evidence or testimony that the Sprys sought to obtain, (2) how they intended to obtain the evidence or testimony, or (3) how the

evidence/testimony would raise a genuine issue as to any material fact. The deadline for filing a motion to adjust trial date was July 4, 2014. CP at 254. Plaintiffs failed to file a motion by the deadline and instead filed their August 7, 2014 motion, over a month after the deadline, requesting a trial continuance. In its pleadings and at the September 15, 2014 hearing, PSD presented all of these arguments to the Trial Court, which found no good cause to extend the discovery cutoff or continue the trial date. RP at 6-10.

In exercising its discretion, a trial court may properly consider the prior history of the litigation and any other matters that have a material bearing upon the exercise of the discretion vested in the court. *Trummel*, 156 Wn.2d at 670-71. This Court may find a manifest abuse of discretion only if the Trial Court's decision was based upon a ground that was "clearly untenable or manifestly unreasonable." *Buhr*, 176 Wn. App. at 36, citing *Trummel*, 156 Wn.2d at 671. In light of the Sprys' lack of diligence, their noncompliance with the Trial Court's case schedule, their noncooperation during discovery, and their apparent disinterest in obtaining evidence to prove their case until the eve of dismissal, the Trial Court did not abuse its discretion in denying the Sprys' Motion to Extend Discovery Cutoff. The Court should affirm.

VI. CONCLUSION

The Sprys failed to produce specific and material facts to establish their prima facie case of race discrimination under the WLAD, failed to

raise their retaliation claim in the Trial Court, and failed to oppose dismissal of their common law negligence claims. For the reasons enumerated herein, this Court should affirm the Trial Court's summary judgment dismissal of the Sprys' claims against PSD and its denial of their motion to extend the discovery cutoff and continue the trial date.

RESPECTFULLY SUBMITTED this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 3, 2015, I electronically filed the foregoing with the Clerk of the Court of Appeals, Division II, and served a copy upon *Pro Se* Appellants at the address and in the manner described below:

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